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Supreme Court of the United States

October Term, 1962

No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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against

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 29, 1962.

Opinions Below

The opinions of the Court of Appeals dated June 29, 1962 and of the United States District Court for the Southern District of New York dated June 29, 1960 have not yet been reported, and are set forth in full in the Appendix hereto.

Jurisdiction of This Court

The judgment of the Court of Appeals was entered on June 29, 1962.

The jurisdiction of this Court is invoked under 28 U. S. C. Sections 1254(1) and 2101(c).

Questions Presented

1. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?

2. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when the record shows that diversity of citizenship existed between the parties?

3. Is a seaman entitled to have submitted to a jury as part of his Jones Act suit his claim for aggravation of injuries caused by failure to provide timely and adequate maintenance and cure?

4. Has a seaman's right to a proper jury trial on his Jones Act claim been violated when a trial court excludes the sole independent evidence of prior complaints and notice to the shipowner of the alleged dangerous condition?

Statement

Petitioner's intestate, an able bodied seaman, was directed by respondent's ship's officer manually to carry numerous articles, including several one hundred pound barrels of cement and one two hundred pound barrel, up an inclined ship's gangway in the Port of New York on November 6, 1954. He alleged that this procedure was improper and dangerous and that instead of manually carrying the goods aboard, a pallet, skid or platform, attached to the ship's winches, should have been used to lift the goods mechanically from the pier to the ship's deck.

Petitioner's intestate alleges that he twisted his back and suffered injuries thereto as a result of this work. He further alleged that the strain of this work caused injury to his heart.

Petitioner's intestate was subsequently treated at the United States Public Health Service facilities in New York, and his condition was diagnosed as herniation of the nucleus polposus—a ruptured spinal disc. The U.S.P.H.S. physicians also determined that a cardio vascular condition—an aneurysm of the thoracic aorta, constituting an enlargement and stretching of the walls of the major blood vessel leaving the heart—was present.

Petitioner's intestate was discharged from the U.S.P.H.S. Staten Island Hospital on March 1, 1955, after 48 days of in-patient treatment, as having received maximum hospital benefits. He received no further treatment.

Respondent refused to pay him any maintenance and cure, except for $34, covering a four-day period in December, 1954 when petitioner was an out-patient and before he entered the hospital.

The complaint asserted Jones Act negligence and unseaworthiness of the vessel, seeking $75,000 damages. This cause of action also asserted that the respondent was further negligent "in failing to provide the plaintiff with timely, adequate, proper and competent medical care and attention and maintenance and cure, thereby aggravating his condition."

A second cause of action was also alleged, seeking $10,000 for unpaid maintenance and cure and earned wages.

At the outset of the trial on May 12, 1960, petitioner's counsel stated to the trial court that he desired a jury trial on all issues. A jury demand as to all causes of action had been duly endorsed on the original complaint.

The trial court nevertheless ruled that the claims relating to maintenance and cure were to be tried to the court only, without a jury. Petitioner's counsel orally argued to the trial court that an action for maintenance and cure was

a common law action that existed prior to the establishment of the admiralty jurisdiction of the Federal Court, that it was properly brought on the law side of the Federal Court by the petitioner, and that the claims relating to maintenance and cure could have been brought in the State Court where petitioner without question could have had a jury trial on the maintenance and cure issues. In the brief oral argument which occurred before the trial court made his final ruling that there would be no jury trial of the maintenance and cure issues, petitioner's counsel cited to the trial court the authority of *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957).

Petitioner's position was rejected in entirety by the trial court, and prior to the receipt of any evidence, the trial court directed that all issues relating to maintenance and cure be tried to the Court, stating:

> "and if there is any additional testimony necessary, I will hear that after the jury has rendered its verdict."

At the trial the petitioner's intestate testified that he had complained to his immediate superior, one Manzo, that the manual loading procedure was "too dangerous", but he was ordered to continue the work in the same manner. Respondent's counsel was permitted to advise the jury that Manzo had died during the pendency of the litigation.

Both sides presented experts as to the propriety of the manual loading procedure, as against the use of the ship's winches. The experts of each side directly contradicted each other.

Petitioner's intestate presented a fellow working seaman, one Murrell, who had helped him during the loading work on the day of the accident and on previous occasions when similar manual loading work was done. The trial court refused to allow Murrell to testify that on the earlier occasions, when loading even lighter goods than

involved on November 6, 1954, the date of petitioner's intestate's alleged injury, he, Murrell, had complained to the ship's superiors that the manual loading procedure was dangerous.

Petitioner had originally claimed that the gangway used for the loading work had rope instead of wooden handrails, and was therefore defective. Respondent accordingly impleaded the United States of America, which had provided the gangway, as a third party defendant.

The claim of rope handrails was withdrawn at the close of petitioner's case and the third party action against the United States therefore discontinued. A stipulation to that effect was read to the jury.

Petitioner pressed his claim that the manual procedure and use of the gangway to load the barrels of cement and ship's stores had constituted a dangerous procedure, particularly inasmuch as the gangway was necessarily set on rollers and the ship was floating and moving with the harbor currents and tides.

Both sides presented medical expert evidence to the jury as to the cause and extent of petitioner intestate's back and cardiovascular conditions. Petitioner's experts stated that the back condition had been caused or "lighted-up" by the strain of manually carrying the 100 pound barrels of cement up the inclined gangway on November 6, 1954. Petitioner's medical experts also asserted that the previously non-disabling aneurysm of the thoracic aorta had been strained, aggravated and rendered into a disabling condition as a result of the described manual effort. The respondent's physicians denied these claims in entirety.

No evidence was presented to the jury of the need for present treatment, or of the aggravation of petitioner's intestate's medical condition due to the respondent's failure to provide timely or adequate medical care or maintenance and cure following his injury of November 6, 1954.

The jury was directed by the trial court to return a special verdict, and answer 6 different questions with subparts constituting 12 questions. The jury found for the respondent on the ground that there was neither unseaworthiness or negligence.

The trial court thereupon held additional hearings without the jury for the purpose of determining the issues relating to maintenance and cure. Petitioner sought a large sum for the unpaid maintenance and cure and for damages arising from the failure to pay the same, asserting that his discharge from the U.S.P.H.S. Staten Island Hospital on March 1, 1955 did not constitute completion of his need for curative medical care, that he had been left without required medical care for the several intervening years despite his need for same, and that at the time of trial in June 1960 he was still in need of medical care, both for his back and cardio vascular condition.

The trial court chose to disbelieve the testimony of the former Chief of the Orthopedic Service of the U.S.P.H.S. Staten Island Hospital where petitioner's intestate had been treated in 1955, who testified on petitioner's behalf that petitioner's discharge from the U.S.P.H.S. hospital as an in-patient with maximum hospital benefits was not to be equated with a finding that maximum recovery had been achieved or with a finding that no further beneficial medical care was possible or required. The trial court also rejected the same physician's conclusions, based on his examination of the petitioner's intestate and the hospital record, that at the time of trial and throughout the intervening time petitioner's intestate was in need of and would benefit from further non-surgical orthopedic therapy, which would have the curative effect of converting petitioner's intestate's condition from one of complete disability to one allowing him to perform work as a watchman or of a sedentary nature.

The trial court similarly chose to disbelieve petitioner's cardiac experts who testified that petitioner's intestate's cardio-vascular condition had been non-disabling prior to his service on respondent's ship, that it had grown more severe during his 13 months service aboard the ship, and that at the time of trial petitioner's intestate was in congestive heart failure and in sharp need of medical care. Petitioner intestate died on November 6, 1960, four months after the trial, of congestive heart failure.

It was on the above issues that petitioner sought and was denied a jury trial, for had a jury elected to believe petitioner's experts rather than respondent's, a substantial sum in maintenance and cure would necessarily have been awarded and petitioner's intestate would have received the medical care his physician testified he was urgently in need of at the time of trial.

Reasons for Granting the Writ

The treatment of this case on the appeal to the Circuit Court is perhaps the best proof of the validity of the instant petition for a writ of certiorari.

The original panel, consisting of Chief Judge Lumbard, former Chief Judge Clark, and Circuit Judge Friendly, after oral argument on January 12, 1962, on the Court's own motion, "determined that the case should be considered in banc" (37, *infra*). The Circuit Court noted that the determination of the majority of the panel (Chief Judge Lumbard and Circuit Judge Friendly), which ultimately became the Court's opinion on behalf of four of the nine Circuit Judges, "conflicted with a recent dictum on the subject by this Court" (37, *infra*). The serious importance of the question of jury trial of a claim for maintenance and cure was recognized as a "problem (which) constantly recurs in the district courts" (37, *infra*), and therefore required definitive determination and in banc consideration.

Then in banc consideration, however, did not result in such definitive determination, because it "produced a variety of views, with none commanding a majority" (37, *infra*).

Four Circuit Judges (Chief Judge Lumbard and Circuit Judges Moore, Friendly and Kaufman), in an opinion by Judge Friendly (35-59, *infra*), held that petitioner as a matter of law could not receive a jury trial of a claim for maintenance and cure, and therefore voted for affirmance of the result below.

Three Circuit Judges (former Chief Judge Clark and Circuit Judges Hayes and Marshall), in an opinion by Judge Clark (60-66, *infra*), held that as a matter of law petitioner was entitled to a jury trial on the maintenance and cure claims, and therefore voted for reversal.

Two Circuit Judges (Circuit Judges Waterman and Smith), in an opinion by Judge Smith (66-67, *infra*), held that it was a matter of discretion for the trial court whether or not to grant a seaman a jury trial on a maintenance and cure claim, and that the action of the trial court in the instant case was not subject to reversal, and therefore voted for affirmance.

Thus by a 5 to 4 vote, and upon an expression of three entirely different viewpoints, the petitioner's appeal was rejected and the result below affirmed.

It is obvious that the consideration of this case by the Circuit Court has not only not settled the questions inherent in the appeal, but raised more problems. In view of the fact that appellate appeals are heard by a panel of only three Circuit Judges, it is now impossible for a District Court within the Second Circuit to predict whether the decision it makes at the inception of a maritime case to reserve the maintenance and cure issues for the Court alone or to submit them to the jury will be affirmed or re-

versed. Only the happenstance of which particular judges will be sitting on the panel at the time of appeal will decide whether what the trial court has done will be affirmed or reversed, and this will be so regardless of which decision it makes. In view of the troublesome division of the Circuit Court on this issue, and the lack of any majority opinion, it is likely that the principle invoked by Judge Clark in *Dunbar* v. *Henry DuBois' Sons Co.*, 275 F. 2d 304, 306 (2nd Cir. 1960), cert. denied 364 U. S. 815:

> "that in a proper case a panel of this Court may frankly state its disagreement with the decision of another panel and refuse to be bound thereby"

will be invoked on the review of the questions here involved, unless this Court renders an authoritative determination of the issue.

Further emphasizing the need for authoritative determination of the issue by this Court is the fact that the District Courts in New York handle a heavy concentration of maritime litigation. As noted in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 350 U. S. 573, this Court will grant a writ of certiorari even where there is an apparent lack of conflict with other Circuits if the question raised is an important one, and there is a heavy concentration of similar litigation within the Circuit involved.

There can be no question that the issue of the right to a jury trial is one that is basic and vital to every litigant and one which arises in every litigation of this type. It involves an important decision as to the entire conduct of the trial, order and form of presentation of evidence, and instruction of the jury. The decision must be made at the very inception of the proceeding by the trial judge. It affects one of the most cherished and constitutionally protected rights of all litigants before our courts.

Thus the review that is here sought is not one which merely affects this petitioner, but one which involves a

basic principle and the basic rights of all seamen having need of the protection of our courts, and one which affects the basic nature of the conduct of innumerable litigations within the Federal Court system. It would, therefore, seem that the criteria for granting of a writ of certiorari are met herein.

Additionally it must be noted that the determination of the Circuit Court in the instant matter is in direct conflict with the policy and decisions of the First Circuit. That Circuit provides jury resolution of all aspects of seamen's actions, including their maintenance and cure claims. See *Mitchell v. Trawler Racer, Inc.*, 265 F. 2d 426, 427 (1st Cir. 1959), reversed on other grounds, 362 U. S. 539 (1960); *Jenkins* v. *Roderick*, 156 F. Supp. 299, 304-306 (D. Mass. 1957).

On the other hand, the First Circuit is in direct conflict with the view of the Third Circuit that jury trial of a maintenance and cure claim is improper and reversible error, as expressed in its leading case of *Jordine* v. *Walling*, 185 F. 2d 662 (3rd Cir. 1950).

This petition has deliberately not sought to persuade this Court that error was committed below, notwithstanding that petitioner is deeply persuaded that error did occur and that petitioner was harshly and improperly deprived of his fundamental right to a jury trial.

Petitioner, however, assumes that the function of a petition for writ of certiorari is to demonstrate that an important legal question is present and that conflict exists in and between the Circuit Courts, which conflict requires resolution by this Honorable Court. On performing this limited function, the purpose of the petition is completed—argument as to the error of the Court below is required to await the submission to this Court of this case on its merits, if the writ of certiorari be granted.

Furthermore, in the instant case, reference, without further argument, to Judge Clark's opinion (60-66, *infra*) would seem sufficient for the purpose of this petition. Judge Clark, in his opinion, spoke eloquently of the "cavalier treatment of perhaps the most cherished of all procedural rights" (64, see also 64 fn. 2, *infra*) dealt by the majority of the Circuit Court to petitioner's quest for a jury trial herein. Judge Clark's opinion (61-62, 65 fn. 3, *infra*) also clearly sets forth the basic policy justification for a jury trial of a seaman's maintenance and cure claim, and the avoidance thereby of the double recovery problems and complications of the charge to the jury discussed more fully in *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911, 916-917 (2nd Cir. 1960) and *Jenkins* v. *Roderick*, 156 F. Supp. 299, 304-306 (D. Mass. 1957).

There are only two additional points to be made by petitioner.

A.—Petitioner had an unquestionable Jones Act claim for damages alleged in the complaint of the failure of the respondent "to provide * * * timely, adequate, proper * * * maintenance and cure, thereby aggravating his condition." See *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932); *Sims* v. *U. S. of A. War Shipping Admin.*, 186 F. 2d 972, 973 (3rd Cir., 1951), cert. denied 342 U. S. 816 (1951); *Murphy* v. *Light*, 258 F. 2d 323 (5th Cir. 1958); cf. *Brown* v. *Dravo Corp.*, 258 F. 2d 704 (3rd Cir. 1958), cert. denied 359 U. S. 960 (1959).

The petitioner presented no evidence on these issues to the jury herein because the trial court had at the inception of the trial instructed petitioner's counsel to reserve "any additional testimony necessary (to the maintenance and cure claims) and I (the trial court) will hear that after the jury has rendered its verdict." To now assert, as Judge Friendly does (40, *infra*), that this right to a jury determination was surrendered by petitioner because "no evidence was adduced (before the jury) to support it"

(40, *infra*) is to penalize the petitioner because his counsel followed the previously announced firm direction of the trial court that all matters relating to maintenance and cure would be tried by the court alone at hearings to be held subsequent to the return of the jury verdict.

It should be clear that counsel may not be deemed to waive rights or parties be penalized because a previously announced ruling of a trial court is conformed to throughout the remainder of the trial. See *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (2nd Cir. 1952), cert. denied 343 U. S. 966 (1952); and particularly so where as basic a right as the one of a seaman to a jury trial is involved. See, *Michalic* v. *Cleveland Tanker, Inc.*, 364 U. S. 325 (1960); *Sentilles* v. *Inter Caribbean Shipping Corp.*, 361 U. S. 107 (1959); *Ferguson* v. *Moore McCormack Lines*, 352 U. S. 521 (1957); *Jacob* v. *City of New York*, 315 U. S. 752 (1942). See, also, *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253, 261, fn. 3 (2nd Cir. 1956).

B.—Petitioner appealed to the Circuit Court on the additional ground that the trial court improperly excluded the sole independent eye-witness evidence supporting petitioner's claim that respondent's officers had been warned by the working personnel that the manual loading procedure for ship's stores was difficult and dangerous (see pp. 4-5, *supra*). As is clear from the opinion of the Circuit Court, this appeal was well taken by the petitioner, for the trial court was held to have been clearly wrong in its exclusion of this evidence. (See 39, *infra* and the cases there cited by Judge Friendly.)

Notwithstanding acceptance of petitioner's contention, the Circuit Court determined for itself that "the probative effect of the excluded evidence would not have been great" (39, *infra*) and held the exclusion of the evidence, though error, not to be grounds for directing a new jury trial.

In so doing the Circuit Court took upon itself the function of the jury to weigh and determine the effect and probative value of evidence. The Circuit Court did so in a case involving a seaman where jury resolution of disputed factual issues and inferences therefrom is particularly held to be inviolate. *Michalic* v. *Cleveland Tankers, Inc., supra, Sentilles* v. *Inter Caribbean Shipping Corp., supra, Ferguson* v. *Moore McCormack Lines, supra, Jacob* v. *City of New York supra.*

This action of the Circuit Court was particularly improper because it involved an item of evidence which was crucially determinative of petitioner's case before the jury. The only evidence, other than the matter excluded by the trial court and not heard by the jury, of the dangerous nature of the manual loading procedure, was petitioner's intestate's own testimony and that of his experts. His own tetimony was, of course, suspect as that of an interested party. This was so particularly in the trial setting, inasmuch as the petitioner's intestate spoke no English and testified through a Spanish interpreter, and the fact that he had a long-standing syphilitic infection was known to the jury and not left undiscussed by respondent's trial counsel.

In such circumstances petitioner's need for independent corroborating testimony was extreme. The Circuit Court's response was that he obtained this through the testimony of his maritime experts (39, *infra*), but since respondent presented an equal number of experts who testified to the contrary, it was more than likely that both sets of experts merely cancelled each other out. Not only was the petitioner deprived of the benefit of Murrel's testimony in support of the petitioner, but the jury's failure to receive any testimony from Murrell of prior complaints could serve only to create a conviction on their part that petitioner's intestate had testified falsely when he charged that the men had complained of the danger of the manual loading procedure and that the work was dangerous.

Proof that a prior complaint of the dangerous procedure had been given to respondent's officers was vital to petitioner Jones' Act negligence claim on the legal issue of notice and for the persuasive purpose of convincing the jury that the respondent's ship's officers had acted improperly and without due care and concern for the safety of their manual workmen. It is doubtful whether petitioner was entitled to a verdict on unseaworthiness on the grounds of adoption by the ship's officers of an improper work procedure, if the law is as was recently stated in *Pinto* v. *States Marine Corp.*, 296 F. 2d 1, 3 (2nd Cir. 1961), cert. denied 369 U. S. 843 (1962).

Thus the evidence erroneously excluded by the trial court was the sole independent evidence of the crux of petitioner's case.

It is respectfully submitted that in principle it is just as erroneous to fail to reverse and remand a case where evidence has been concededly erroneously excluded as it is for a court to dismiss a case because it does not believe certain evidence is sufficiently probative or forceful to justify a jury determination in the first instance. It is well settled, particularly in seamen's actions, that failing to allow a plaintiff a jury determination of the weight and effect of disputed evidence is error. *Michalic* v. *Cleveland Tankers, Inc., supra; Sentilles* v. *Inter-Caribbean Shipping Corp., supra; Ferguson* v. *Moore-McCormack Lines, supra; Jacob* v. *City of New York, supra.*

In analagous circumstances, this Court, in *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U. S. 525, 528-533 (1958), held that it was error for a Circuit Court to deprive the petitioner, a personally injured power line worker, of the right to submit evidence to a jury and obtain its determination of the weight of that evidence following a finding by the Circuit Court that the District Court had erroneously excluded evidence and adopted an improperly narrow theory of the scope of the issues to be determined by the jury.

In this respect the discussion in *Byrd* directly suggests the error of the treatment rendered by the Court of Appeals for the Second Circuit in the instant case, both of the issue of non-presentation to the jury of evidence as to petitioner's Jones Act claim for aggravation of injuries due to failure to provide maintenance and cure, following the trial court's ruling that such evidence and issues would not be presented to the jury but would be decided by the court alone, and the issue of the Circuit Court's failure to remand the case for a new trial after determining that evidence was erroneously excluded, holding instead that it believed that "the probative effect of the excluded evidence would not have been great" (39, *infra*).

As this Court's opinion in *Byrd* clearly indicates, the petitioner should have received a new trial so that he could present evidence to a jury on the additional issues of unpaid maintenance and cure now found to be proper matters for the jury and for the purpose of permitting a jury, rather than a Circuit Court, to determine the effect of the erroneously excluded evidence.

Were this Court to allow review of this issue, as well as the issue of jury trial of a maintenance and cure claim, it would not be merely reviewing conflicting inferences from a set of facts. The purpose of review of this issue would be to determine whether a Circuit Court, upon recognizing clear error in the admission or preclusion of important evidence in the trial of a seaman's personal injury action may itself undertake the function of the jury in determining the effect such evidence would have had upon the jury, or must the Circuit Court instead preserve the inviolate right of a seaman (or any litigant in the Federal Court system; see *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U. S. 525, 537-539; 1958) to a full jury determination of the evidence and the disputed factual issues and inferences therefrom.

It is respectfully submitted that this Court may and should grant a writ of certiorari herein so that this Court can declare itself on these issues for the proper guidance of the lower courts.

CONCLUSION

In view of the basic nature of the issues here involved and their relationship to the whole scope of maritime liability and the proper conduct of innumerable maritime personal injury cases now pending in the District Courts, and the different positions taken on the issue of a seaman's right to a jury trial on his maintenance and cure claims by the different Circuit Court Judges of the Court of Appeals for the Second Circuit, and the conflict between the Courts of Appeals for the First Circuit and the Third Circuit on the same issue, petitioner respectfully prays that a writ of certiorari issue herein to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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BENJAMIN GLICKMAN,
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APPENDIX

Opinion, Findings of Fact and Conclusions of Law of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

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JACOB RASSNER, Counsel for Plaintiff, 15 Park Row, New York, N. Y.; THEODORE H. FRIEDMAN, of Counsel.

LEVET, D. J.

The first cause of action herein was an action under the Jones Act (46 USCA § 688), based upon the alleged negligence of the defendant and upon the alleged unseaworthiness of the vessel. This issue was tried to the Court and jury and a verdict thereon rendered for the defendant.

The second cause of action, for maintenance and cure, was tried before the court. All relevant testimony taken before the jury and subsequently before the court has been considered.

After hearing the proofs and evidence of the parties, and after examining the pleadings, exhibits, briefs and requests to find submitted, I find as follows:

FINDINGS OF FACT

1. Plaintiff, a seaman, born December 31, 1897, was employed aboard the defendant's vessel, the SS American Reporter, as a crew member in the capacity of a wiper from on or about November 3, 1953 to December 15, 1954.

2. The defendant, United States Lines Company, is a corporation doing business within the State of New York. Through the aforesaid period of employment said defendant owned, operated, managed and controlled the said SS American Reporter.

3. Prior to said employment by defendant, plaintiff was given a pre-employment physical examination by defendant's physician and was accepted for employment. The ordinary pre-sign-on examination would not have revealed the aneurysm hereinafter referred to. A chest x-ray would have been required.

4. In 1945, plaintiff was told that he had contracted syphilis. This went untreated for a number of years and had produced an aneurysm of the ascending aorta of plaintiff's heart and heart failure for which he was subsequently treated by a private doctor, Dr. Frank Spindler, from March 2, 1952 to September 18, 1953. Dr. Spindler informed plaintiff of his said ailments and indicated he might work at his calling.

5. The plaintiff at no time disclosed to defendant the fact that he had syphilis or that syphilis had produced an aneurysm of the ascending aorta and heart failure.

6. On December 5, 1954, while the ship was at sea, the plaintiff reported to the purser complaining of pains in his lower back and left leg, which condition plaintiff said originated on November 4, 1954; as a result the plaintiff became disabled and unfit for duty aboard said vessel on December 13, 1954. On December 15, 1954, after further complaints, plaintiff requested a hospital slip, and a master's certificate was that day issued to him to obtain "treatments of rheumatic pains in leg."

7. While plaintiff served on the SS American Reporter there were no manifestations of his cardio-vascular condition or any complaints from him relating thereto; his sole purpose in signing off the vessel on December 15, 1954 was to obtain treatment for his leg.

8. Plaintiff was treated as an out-patient for said complaints and pains at the United States Public Health Service Out-Patient Clinic at 67 Hudson Street, New York, N. Y., from December 20, 1954 to January 12, 1955, and as an in-patient at the United States Public Health Service Hospital at Stapleton, Staten Island, New York, from January 12, 1955 to March 1, 1955. Here, the sole complaint of plaintiff was "pain in the muscle of the left calf for 2 months."

9. During the course of these treatments at the Marine Hospital at Hudson and Jay Streets, New York, N. Y., the aneurysm of the ascending aorta was noted.

10. There is no evidence that plaintiff's condition relating to his cardio-vascular system, i.e., the enlargement of the cardiac vessels, became disabling during the period of plaintiff's service aboard defendant's vessel or that the service of plaintiff aboard such vessel aggravated such condition.

11. The plaintiff was admitted to the United States Marine Hospital at Stapleton, Staten Island on January 12, 1955 and he remained there until discharged on March 1, 1955. The diagnosis there was (1) aneurysm of aorta due to arteriorsclerosis; (2) herniation of nucleus pudposus due to unknown cause; (3) syphilis of undiagnosed site. The prognosis was guarded and the disability was stated "not fit for duty indefinitely." The plaintiff denied chest

pain and upon admission to the Marine Hospital made no complaint with respect to his cardio-vascular condition. He was held not to be a candidate for surgery (as to the herniation) because of the aneurysm.

12. The plaintiff's condition relating to his back and left leg, i.e., the herniation of the nucleus pulposus at the L5-S1 level at the left, arose while plaintiff was in the service of the defendant's vessel and on or about November 4, 1954.

13. At the time of his discharge from the Marine Hospital on March 1, 1955, plaintiff had reached the point of maximum possible cure as to his back condition. There was no further treatment which could have improved his condition.

14. On March 1, 1955, the plaintiff had reached the maximum cure as to the cardio-vascular condition, and on October 30, 1957 and April 28, 1960 was not suffering from congestive heart failure. (See testimony of Dr. Eugene Clark.)

15. The plaintiff has not received any medical treatment for his back or cardio-vascular conditions since his discharge from the Marine Hospital at Stapleton, Staten Island, New York on March 1, 1955.

16. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December 15, 1954 to January 12, 1955—28 days—for a total of $224.00.

DISCUSSION

The testimony of the principal witnesses is as follows:

Dr. Irving Mauer, an orthopedic surgeon of considerable standing, testified upon behalf of plaintiff.

He testified that when he examined the plaintiff on May 2, 1960, he found the following conditions: Limitation of back motion; limitation of straight leg raising; weakness; absence of the left ankle jerk; weakness of the left extensor halluois longus with hypasthesia over the lateral aspect of the left leg extending to the lateral aspect of the foot. He also found varicosities affecting both lower extremities; atrophy of the left thigh and atrophy of the left calf; tenderness along the spinous and interspinous ligaments.

Dr. Mauer stated that in his opinion the plaintiff had not reached the maximum cure with respect to his back.

The treatment which he recommended is the so-called "conservative treatment", consisting of (1) wearing a brace; (2) physiotherapy; and (3) injection of vitamin B-12. These treatments would cover periods of from one year to 18 months, and apparently would cost between $1,420 and $2,120. During the treatment recommended, the exercise tolerance would have to be built up by reason of the cardiac situation. This treatment, in the opinion of Dr. Mauer, would partially restore the plaintiff to a condition in which he might work at nonarduous tasks such as an elevator operator, an assembler of parts or a job conducted in a sedentary manner.

Dr. Mauer reiterated the above opinion in spite of the fact that the hospital records of the Marine Hospital indicated that on March 1, 1955 the patient, San Martin, had received maximum hospital benefits and in spite of the further fact that Dr. Mauer was a member of the staff of that hospital at that time, although it appears that he was not one of the reporting examiners as to this particular patient.

Dr. Irwin Balensweig, who is an orthopedist and traumatic surgeon, testified in substance as follows:

He examined the plaintiff on June 25, 1956 and on May 13, 1960 and he stated that he had reviewed the hospital records and taken certain X-drays.

The hospital records at the Marine Hospital indicated that at the time of discharge San Martin had reached maximum hospital benefits, and Dr. Balensweig said that in his opinion also San Martin had reached maximum medical treatment benefits at that time. He indicated that there would be no benefit from further therapy treatments now; that a brace would not correct the herniated disc, if there were one, and that the injection of vitamin B-12 was not used in the treatment of backs. Dr. Balensweig concluded by stating that there was nothing to do for San Martin except that San Martin should adapt himself to his complaints.

Dr. Frank Spindler, an internist and general practitioner, testified that he treated the plaintiff some 82 times from March 4, 1952 to September 18, 1953, treating both a syphilitic condition and a heart condition. He talked to the plaintiff about his heart condition and advised hospitalization.

However, on or about September 18, 1953, Dr. Spindler examined the plaintiff, who then complained only of nervousness. Dr. Spindler then gave it as his prognosis that the plaintiff could work.

Dr. Spindler examined the plaintiff again on May 27, 1960. "I again took his blood pressure; it was 150 systolic over 90 diastolic. I listened to the heart. He had an enlarged heart, regular beat, 100 per munite. He had an aortic systolic murmur and an aortic diastolic murmur. The apex of the heart was displaced to the sixth interspace about 4 centimeters to the left of the nipple. I again fluoroscoped him and he demonstrated this time the enlargement of the heart, but with two densities, the density I described originally to the right ventricle and another density on the arch of the aorta, which, without doubt, is an aneurysm. I weighed him. I gave him some treatment."

Dr. Spindler testified that San Martin had not reached the maximum cure for the cardio-vascular condition and he

recommended the following treatment: Treatment would consist of what Dr. Spindler called "compensation", by the removal of the fluid from the tissues of the body, either from the base of the lung or the extremities, upper or lower, or at any other soft tissue parts of the body. The method used is the standard mercurial diuretics together with new agents found within the last year. This treatment, the doctor said, would require from three to five years. In the beginning the treatment would be weekly for about two months and then after that monthly. The minimum time would be three years. The cost, he said, would be $10.00 per treatment, including medication.

Dr. Eugene Clark, a specialist in heart and cardiovascular matters, testified that he examined the plaintiff on October 30, 1957 and on April 27, 1960. He also made X-rays, cardiographs, took blood tests and made a urine analysis. He said the aneurysm was the size of a fist and would have required a development of ten years before December 1954 and that the cause of this aneurysm was syphilis. He also said that the ordinary pre-sign-on examination would not have revealed the aneurysm; that a chest X-ray was required to discover this.

Dr. Clark testified that there was no indication at the time of the Hudson & Jay Street Hospital clinical records, December 20, 1954 to January 6, 1955, or the Marine Hospital record or on his examination of October 30, 1957 or on his last examination on April 27, 1960 that the plaintiff was suffering from congestive heart failure.

Dr. Hyman Arenberg, who is a specialist in internal medicine and cardiology, testified for the plaintiff.

Dr. Arenberg said that he had examined plaintiff on June 23, 1960 and that, in his opinion, plaintiff was now suffering from congestive heart failure; that he has an aneurysm of the arch of the aorta of long standing.

The doctor testified that treatment of the plaintiff should be administered to diminish the fluid in his body

in order to decrease the size of the heart, diminish the congestion in the lungs and diminish the extent of the peripheral edema that plaintiff has in his legs. This treatment, accompanied by a low sodium diet and the loss of 25 or 30 pounds and with the taking of digitalis to reduce the heart rate and to give a greater efficiency of cardiac contraction, along with diuretics, would improve the plaintiff considerably. He might then be able to work as a watchman, although not to go back as a seaman. The minimum time of such treatment would be six months. The doctor was not too definite about the cost, although there was some indication that this would involve two treatments a week at about $3.00, or perhaps a total of $100.00.

The Court of Appeals for this circuit has recently commented on a seaman's right to maintenance and cure as follows:

> " '[T]he vitality of a seaman's right to maintenance and cure has not diminished through the years.' Mitchell v. Trawler Racer, Inc., supra, at —— [28 U. S. L. Week 4293, decided May 17, 1960]. It has become established that the obligation of the shipowner attaches as a result of the relationship of employment without any regard for the form of the contract or the will of the contracting parties. Cortes v. Baltimore Insular Line, 1932, 287 U. S. 367, 372. The rights of the seaman are neither conditioned on fault on the part of the shipowner nor on the absence of fault on his part. Farrell v. United States, 1949, 336 U. S. 511. Nor must the injury or illness be in any way causally connected with shipboard duties. Farrell v. United States, supra. The obligation to provide maintenance and cure has been expanded so far that two of the foremost admiralty scholars have concluded that 'With

> the exception of borderline cases on misconduct • • • [t]he remedy has become absolute.' Gilmore and Black, The Law of Admiralty (1957) 261." Bartholomew v. Universe Tankships, Inc., 2 Cir., No. 25989, decided June 21, 1960.

Of course, this responsibility of the shipowner to provide maintenance and cure extends only until the point of maximum recovery. Salmar SS Corp. v. Taylor, 1938, 303 U. S. 525; Farrell v. United States, 1949, 336 U. S. 511.

As with other well-defined rules of law, difficulties arise in the application to a given factual situation. The problem present here stems from the fact that the plaintiff has two distinct physical disabilities.

As heretofore found, the heart condition pre-existed employment and did not manifest itself during the employment. The responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen *becoming ill or injured* during the period of their service. See Aguilar v. Standard Oil Co., 1942, 318 U. S. 724, 730, including Note 6, p. 730.

Cases cited by the plaintiff are not applicable. They involve situations where a pre-existing condition either becomes aggravated or manifests itself during service on the vessel or are cases based upon a ship-incurred ailment. See Ahmed v. United States, 2 Cir., 1949, 177 F. 2d 898; United States v. Robinson, 5 Cir., 1949, 170 F. 2d 578; Hern v. Moran Towing and Transportation Co., 2 Cir., 1943, 138 F. 2d 900; Rey v. Colonial Nav. Co., 2 Cir., 1941, 116 F. 2d 580; Lindgren v. Shepard S.S. Co., 2 Cir., 1940, 108 F. 2d 806.

In any event, I am convinced that the heart condition was incurable on March 1, 1955 when the plaintiff was discharged from the Marine Hospital. When meaningful hopes for recovery end, the shipowner's liability ends.

If the disease is incurable the shipowner has no further liability even though the patient may require additional treatment to restrain degeneracy or relieve pain. Desmond v. United States, 2 Cir., 1954, 217 F. 2d 948.

I am impressed by the testimony of Dr. Eugene Clark, who examined the plaintiff on October 30, 1957 and on April 27, 1960 and examined the records of the Marine Hospital. Dr. Clark found no indication of a congestive heart failure. The "compensation" treatment described by Dr. Spindler would not improve the essential heart condition of the plaintiff—the enlargement of the cardiac vessels.

The back condition of the plaintiff—the herniation of the nucleus pulposus—arose while plaintiff was in the service of defendant's vessel. The shipowner was obligated to furnish maintenance and cure until such time as the disease was cured or recognized as incurable. This duty does not extend beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing care and medical treatment. Calmar SS Corp. v. Taylor, 1938, 303 U. S. 525, 530.

In this case, the aneurysm of the aorta due to arteriosclerosis made surgical intervention to cure the herniation of the nucleus pulposus impossible. When the plaintiff was released from the Marine Hospital on March 1, 1955 maximum hospital benefit was indicated. It is the contention of the plaintiff that conservative treatment should have been given which would have rehabilitated from to a point where he could have obtained sedentary employment. At issue, therefore, is the meaning of the word "cure."

In The Bouker No. 2, 2 Cir., 1917, 241 Fed. 831, 835, "cure" was defined as follows:

> "• • • We agree with the remark in The Mars, supra [149 Fed. 729, 79 C. C. A. 435 (C. C. A. 3d)], that:

> " 'The word "cure" is used in its original meaning of care, and means proper care of the injured seaman, and not a positive cure, which may be impossible.'
>
> "Furthermore, 'cure' has been held to signify:
>
> " 'The ordinary medical assistance and treatment in case of injury or acute disease, for a reasonable time. The ship is not bound to pay for (the sailor's) medication for the cure of a chronic disorder for an indefinite length of time.' The Ella S. Thayer (D. C.) 40 Fed. 904.
>
> "Nor does the liability of the ship extend beyond —'expense of effecting a cure by ordinary medical means. This does not include extraordinary medical treatment or treatment after cure effected as completely as possible in a particular case.' The C. S. Holmes, supra [(D. C.) 209 Fed. 970]."

In Carlsson v. United States, 2 Cir., 1958, 252 F. 2d 352, the court noted that the right to maintenance and cure may continue to exist until maximum *rehabilitation* has been obtained. However, in Buch v. United States, 2 Cir., 1955, 220 F. 2d 165, an award based upon rehabilitation program was reversed when the Appellate Court found insufficient evidence to demonstrate the curative nature of the treatment. The curative nature of the treatment was also emphasized in Bradt v. United States, 2 Cir., 1955, 221 F. 2d 325.

Maximum cure is reached when no further improvement in the seaman's condition is to be expected. Wilson v. United States, 2 Cir., 1956, 229 F. 2d 277; Koslusky v. United States, 2 Cir., 1953, 208 F. 2d 957.

No further improvement in plaintiff's back condition could have resulted from any treatment after March 1, 1955. The treatment described by Dr. Mauer is not of a sufficiently

curative nature to be classified as cure. Dr. Mauer's conservative treatment consists of the wearing of a brace, physiotherapy and vitamin B-12 injections. This treatment appears to be in the nature of an attempt to restrain degeneracy or relieve pain rather than curative. See Desmond v. United States, 2 Cir., 1954, 217 F. 2d 948.

In addition, Dr. Mauer examined the plaintiff on May 2, 1960. It is not unreasonable to assume that some of the conditions found on that date, namely the general weakness and the atrophy of the left thigh and left calf, were directly related to the five years spent in inactivity without medical care since March 1, 1955. There is no assurance that the so-called "conservative treatment," which in essence is exercise and the wearing of a brace, was indicated by his condition on March 1, 1955.

Dr. Balensweig, who examined the plaintiff on June 25, 1956 and who examined the hospital records at that time, was of the opinion that the plaintiff had reached maximum cure at the time of the discharge from the hospital.

There is no evidence here that subsequent to March 1, 1955 the plaintiff ever sought medical treatment or incurred medical expense. See Carlsson v. United States, 2 Cir., 1958, 252 F. 2d 352, 353. This is not to indicate that this failure to seek medical attention would warrant a forfeiture of his right to maintenance and cure. See Gardner v. Sinclair Refining Co., 3 Cir., 1955, 227 F. 2d 958.

But the failure of the plaintiff to seek such relatively simple treatment for over five years raises doubt as to the validity of the proposed cure. See Buch v. United States, 2 Cir., 1955, 220 F. 2d 165, wherein the court stated: "Since the libelant has shown no inclination to date to undertake this program, we cannot say that its curative nature was sufficiently demonstrated" (p. 166).

The plaintiff reached maximum cure on March 1, 1955 when all meaningful hopes for recovery ended and no fur-

ther improvement in his condition could be expected. He is entitled to maintenance from December 15, 1954 to January 12, 1955 in the amount of $224, plus interest as hereinafter designated.

Conclusions of Law

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. The defendant has the duty to provide maintenance and cure to any seaman injured or falling ill in the service of the ship.

3. The plaintiff suffered a back injury while in the service of the ship and also suffered from a cardio-vascular condition.

4. The plaintiff reached the point of maximum recovery for both disabilities on March 1, 1955, the date of his discharge from the United States Public Health Service Hospital at Stapleton, Staten Island, New York and no further improvement in his condition could be expected after that date.

5. The plaintiff is entitled to recover maintenance and cure at the rate of $8.00 per day from December 15, 1954, the date of the termination of the voyage of defendant's vessel, to January 12, 1955, the date of his admission to the United States Public Health Service Hospital, a total of 28 days, for a total amount of $224, plus interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Final Judgment of District Court

Let a decree be entered in accordance herewith in favor of the libellant for the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment.

Dated: New York, N. Y., June 29, 1960.

RICHARD H. LEVET,
United States District Judge.

Final Judgment of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The above entitled action having come on for trial before Honorable Richard H. Levet and a jury, and the issues with respect to plaintiff's claim for maintenance and cure reserved for trial by the Court without a jury, and the third party complaint having been dismissed at the close of the evidence in the jury trial by consent, without costs, and the jury having rendered a special verdict with respect to plaintiff's claims for negligence and unseaworthiness in answer to special interrogatories, as follows:

SPECIAL VERDICT

1. Was the order of the defendant, under all the facts and circumstances thereof, to bring the drum

of cement up the gangway on November 5, 1954 a negligent order? No.

2. Was the SS American Reporter unseaworthy? No.

If your answer to either No. 1 or No. 2 is in the affirmative, answer No. 3. If they are in the negative, your verdict is for the defendant.

3. Was the plaintiff injured either as a result of obedience to said order or the unseaworthiness of the vessel?

4. (a) If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, to what award, if any, is the plaintiff entitled for pain, suffering and disability from the date of the accident to the present time as a result of injuries referred to in No. 3?

(b) To what award, if any, is the plaintiff entitled for lost earnings from December 15, 1954 to the present time as a result of injuries referred to in No. 3?

Note: The net earnings after taxes of the plaintiff are to be considered here.

(c) To what award, if any, is the plaintiff entitled for pain, suffering and disability which he allegedly will endure in the future as a result of the injuries referred to in No. 3 and for any future reasonable medical expenses which he will incur as a result of the injuries referred to in No. 3?

(d) For how many years from today forward do you estimate that plaintiff would have been able to work but for the injuries referred to in No. 3 and despite other physical handicaps?

(e) What, if anything, is the annual amount of wages which plaintiff would have earned from today forward but for the injuries referred to in No. 3 and despite other physical handicaps?

Note: The net earnings after taxes of the plaintiff are to be considered here.

(f) What, if anything, is the annual amount of future wages which plaintiff may reasonably be expected to earn from today forward despite the injuries referred to in No. 3 and despite other physical conditions from which he may suffer?

(g) Deducting the sum arrived at in answer to (f) above from the sum arrived at in answer to (e) above, what, if anything, is the annual amount of earnings which will be lost to plaintiff in future years as a result of the injuries referred to in No. 3?

5. If your answers to either No. 1 and No. 3 or No. 2 and No. 3 are in the affirmative, did the plaintiff by any negligent conduct contribute in any degree to the injuries referred to in No. 3?

6. If your answer to No. 5 is in the affirmative, to what extent did plaintiff's negligent conduct so contribute to the injuries referred to in No. 3?

Note: In answering this question state your answer as a percentage.

And the Court having directed judgment with respect to the said claims for negligence and unseaworthiness in accordance with said special verdict

And the Court having filed its opinion, findings of fact and conclusions of law with respect to plaintiff's claim for

maintenance and cure, dated June 29, 1960, granting judgment for the plaintiff in the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, it is

ORDERED AND ADJUDGED that plaintiff's claims for personal injuries based upon negligence and unseaworthiness, be and are hereby dismissed, with prejudice, and without costs, and it is further

ORDERED AND ADJUDGED that plaintiff recover of and from the defendant, for maintenance and cure, the sum of $224 with interest on each day's allowance, such interest on each day's allowance to be computed for the period commencing on such day and running to the date of actual payment, without costs, and it is further

ORDERED AND ADJUDGED that the third party complaint be dismissed, without costs.

Dated: New York, New York, August 30, 1960.

RICHARD H. LEVET,
U. S. D. J.

Rec'd in Clerk's office 9/6/60

JUDGMENT ENTERED this 6th day of September, 1960.

HERBERT A. CHARLSON,
Clerk.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 194—September Term, 1961

(Argued January 12, 1962 Decided June 29, 1962)

Docket No. 26716

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased,

Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY,

Defendant.

Before:

LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge*, in a seaman's action for damages under the Jones Act and for maintenance and cure, dismissing the Jones Act claim on the basis of a special verdict negating negligence and unseaworthiness, and awarding $224 for maintenance and cure. Affirmed.

THEODORE H. FRIEDMAN (Benjamin Glickman, Jacob Rassner), New York, New York, for Plaintiff-Appellant.

MATTHEW L. DANAHAR (Kirlin, Campbell & Keating), New York, New York (John A. Dowd of Counsel), for Defendant.

FRIENDLY, *Circuit Judge*:

This action against United States Lines Company, begun in the Southern District of New York by Andres San Martin, a seaman employed on defendant's vessel, the SS. American Reporter, has been continued, on his death after trial, by the Public Administrator of New York County. The complaint, filed in 1955 and brought to trial in 1960, alleged two causes of action. The first, relying specifically upon the Jones Act, 46 U. S. C. § 688, asserted that by reason of the unseaworthiness of the American Reporter and defendant's negligence, plaintiff had been caused to twist and strain his back while assigned to carry barrels of cement up the ship's gangway on November 6, 1954, and that defendant was further negligent "in failing to provide the plaintiff with timely, adequate, proper and competent medical care and attention and maintenance and cure, thereby aggravating his condition", with total damages of $75,000. The second was for maintenance and cure in the sum of $10,000.

Plaintiff's citizenship was not alleged. Defendant was alleged to be, in paragraph First, "a domestic corporation organized and existing under and by virtue of the Laws of the State of New York" and, in paragraph Second, "a foreign corporation duly licensed to do business within the State of New York." Paragraph Third alleged that "the defendant had an office for the transaction of business in

the Borough of Manhattan, City and State of New York." Compliance with F. R. Civ. Proc. 8(a)(1), demanding "a short and plain statement of the grounds upon which the court's jurisdiction depends", was evidently intended to be met by paragraph Ninth: "Plaintiff elects to maintain this action under the provisions of Section 33 of the Merchant Seamen's Act as of June 15, 1920, C. 250 41 Stat. 1007 otherwise known as the Jones Act." There was endorsed on the complaint "Plaintiff Demands a Jury Trial." In its answer defendant denied being a New York corporation and admitted being a foreign corporation and having a New York office.

Before a jury was chosen, Judge Levet directed that the claim for maintenance and cure be tried to the court only; counsel for plaintiff excepted. On the following morning, discussion of this was resumed in the robing room before the taking of testimony began. Plaintiff's counsel stated that jury trial of maintenance and cure "is a matter of choice for the District Court", and also that "The plaintiff is entitled to a jury on this action which is properly before this Court on a common-law basis"—without further amplification save for reference to "the authority of Jenkins v. Walker" [presumably *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass. 1957)], and "the discussion of that case by the Supreme Court in Romero v. International Terminal." The judge adhered to his ruling "that in this court, in the Second Circuit, it is permissible and authorized to try maintenance and cure to the Court."

At the conclusion of the trial Judge Levit submitted to the jury six questions, relating respectively to negligence, unseaworthiness, resulting injury, amount of damages, contributory negligence, and its degree. The jury gave negative answers to the first two questions; consequently, in accordance with the judge's direction, it did not answer the last four. Appellant makes no complaint as to the form of the questions or the judge's charge; he does complain

about certain rulings excluding evidence, which we will consider below.

In an opinion later filed, the judge found that San Martin had incurred a back injury while in the service of the ship and also suffered from a cardio-vascular condition due in part to untreated syphilis; that he had reached the point of maximum recovery for both disabilities on March 1, 1955, when he was discharged from a United States Public Health Service Hospital; and that liability for maintenance and cure was thus limited to the period, 28 days, before he entered the hospital, to wit, $224. Although appellant criticizes the judge's determination with respect to maintenance and cure, his principal complaint on that aspect of the case is that the judge should not have made any determination but ought to have left the issue to the jury; as to the criticisms apart from this principal complaint, it suffices to say that the judge's determination was not in any view clearly erroneous.

Because the analysis of the right to jury trial of the claim for maintenance and cure made by a majority of the panel conflicted with a recent dictum on the subject by this Court, see Mr. Justice Frankfurter in *Western Pacific Railroad* case, 345 U. S. 247, 270 (1953), and also because the problem constantly recurs in the district courts, we determined that the case should be considered *in banc*, upon the briefs and argument already had. This consideration has produced a variety of views, with none commanding a majority. It will thus be convenient to dispose of the issues relating to the trial of the personal injury claim, which none of us would have thought appropriate for *in banc* consideration if standing alone, before proceeding to the question of jury trial of the claim for maintenance and cure.

I.

Certain of appellant's objections to rulings excluding evidence on his personal injury claim, relating to San Martin's explanation of his failure to make earlier complaint about his injury, his colloquy with physicians at the Public Health Service clinics and hospital, and a report by a physician who testified for him, are rendered moot by the special verdict negating unseaworthiness or negligence; we need concern ourselves only with the exclusion of evidence relating to the accident itself.

Appellant complains that San Martin was not allowed, on direct examination, to testify that he had objected to carrying the two heavy barrels of cement up the gangway. Although we can see no sufficient reason for this ruling, it was not prejudicial since counsel returned to the subject on redirect and, without objection, elicited testimony that San Martin had told his boss, Manzo, the mission was "too dangerous" and the boss had answered "You have to do anyway." Appellant next urges that San Martin was not allowed to testify why he moved from side to side while ascending the gangway. Again the ruling seems needlessly severe but not, as matters developed, prejudicial. The evident purpose of the testimony was to show the gangway was unstable. San Martin was allowed to testify that he moved and that the gangway moved; the physical layout of the gangway was in evidence; and the judge stated in his charge, without exception from plaintiff's counsel, "As appears by the stipulation read to you this morning, it is agreed that the nature and position of the gangway does not enter into the disposition of this case."

Finally, and most important, appellant objects that one of San Martin's fellow-employees, Murrell, was not allowed to answer a question as to conversations with Manzo about bringing aboard engine stores within a month before the accident, even after it had been shown that the weights

of the stores on the prior occasion were less than the 100 pounds San Martin was ordered to carry on the day of the alleged injury. When the judge inquired as to the pertinency of this testimony, counsel answered, not very informatively, "Prior and similar loading procedure," to which the court responded "It is too remote." Assuming in appellant's favor, perhaps somewhat generously, that counsel's remark was an offer to prove that Murrell had complained to Manzo about the manual loading of lesser weights, the evidence should have been admitted. Knowledge of danger is relevant to a determination of negligence, the *Nitro-Glycerin* case, 82 U. S. (15 Wall.) 524, 536-537 (1873), and evidence that such knowledge was gained through an express communication is admissible. 2 Wigmore, Evidence (3d ed. 1940) § 245; *New York Life Ins. Co.* v. *Seighman*, 140 F. 2d 930, 932-933 (6 Cir. 1944); *Evans* v. *Pennsylvania R.R.*, 255 F. 2d 205, 209-210 (3 Cir. 1958); *Smith* v. *Whittier*, 95 Cal. 279, 30 Pac. 529 (1892); *Jenkins* v. *Reichert*, 125 Conn. 258, 5 A. 2d 6 (1939); *Dowling* v. *L. H. Shattuck, Inc.*, 91 N. H. 234, 17 A. 2d 529 (1941); *Killian* v. *Andrews Mfg. Co.*, 187 N. C. 810, 123 S. E. 86 (1924). However, the probative effect of the excluded evidence would not have been great. The case differs significantly from those cited where the dangers were defects in machinery or property, things which the defendant might not notice on his own inspection and, in many instances, so technical that he might not appreciate the danger if he did; in such cases proof of notice is highly critical since there may be no basis for finding the defendant negligent without it. Here the issue related to the safety of the carrying of certain weights by men rather than machines. The jury had the evidence of experts called by both parties, San Martin's own testimony he had told Manzo the procedure was "too dangerous," and its own common sense; if the jury was not persuaded of negligence on that evidence, it hardly would have been by the addition of testimony that

a fellow employee had complained about the procedure on a previous occasion. In *Dowling* v. *L. H. Shattuck, Inc., supra,* where the evidence of a prior communication, held properly admitted, was far more important, the court implied that the trial judge would also have been upheld if he had excluded it. In view of this and the recognized discretion of trial judges to exclude for remoteness, see, e.g., *Duvall* v. *Birden,* 124 Conn. 43, 198 Atl. 255 (1938); *Hutteball* v. *Montgomery,* 187 Wash. 516, 60 P. 2d 679 (1936), reversal with respect to the personal injury claim is not called for, even though a more liberal concept of relevancy would have conformed better with modern trends in the law of evidence.

II.

We can also unanimously dispose of one argument of appellant with respect to the denial of jury trial, namely, that the judge erroneously reserved for himself plaintiff's claim for damages from negligent failure to furnish care or maintenance and cure. Appellee does not dispute that such a claim is conferred by the Jones Act, with the attendant right to trial by jury, *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U. S. 367 (1932); *Vaughan* v. *Atkinson,* — U. S. — (1962). However, although the complaint alleged such a claim, no evidence was adduced to support it, and plaintiff's counsel made no request that any question on this subject be included in those propounded to the jury. We cannot assume the judge would have refused to submit such a question if the evidence had warranted.

III.

Appellant's contention that San Martin was entitled to a jury trial on his claim for maintenance and cure rests on two alternative grounds: (1) that San Martin had invoked the court's diversity of citizenship jurisdiction, 28 U. S. C. § 1332; and (2) that he was entitled to a jury trial irrespective of this because his claim for maintenance and cure was "pendent" to his claim under the Jones Act. This section of the opinion deals with the first ground.

There are many statements by commentators that a seaman properly invoking the jurisdiction of the district court because of diverse citizenship has a right to a jury trial of a claim for maintenance and cure, whether this is asserted independently or joined with other claims. See, e.g., Benedict, American Admiralty (1st ed. 1850 & 2d ed. 1870), p. 107; 1 *id.* (6th ed. 1940), p. 36; 5 Moore, Federal Practice (1951), p. 284; 71 Harv. L. Rev. 1359, 1360 (1958); Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1, 5 (1959);[1] The Supreme Court, 1958 Term, 73 Harv. L. Rev. 126, 139 (1959). The reasoning stems from § 9 of the Judiciary Act of 1789, 1 Stat. 77, carried forward into 28 U. S. C. § 1333(1), wherein the grant to the district courts of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" was qualified with the famous reservation, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The common law is competent to give a common law remedy for breach of the obligation, created by the general maritime law, to pay

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[1] Subject, however, to a *caveat*. "Congress *probably* intended that if he sued in the federal court (as he might if there were diversity of citizenship) he should have the right to a jury trial." [Emphasis supplied.] Perhaps the "*probably*" was due to the considerations outlined in fn. 6.

maintenance and cure, namely, a money judgment against the operator of the ship. The saving clause thus permits a suit to that end in a state court, where jury trial may usually be had, see *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185 (1871); *Norton* v. *Switzer*, 93 U. S. 355, 356 (1876); *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). Hence, it is reasoned, if such a suit were removed to the Federal court because of diversity or brought there on that ground, the saving clause requires jury trial.

In view of the plausibility of the argument and the unanimity of the commentators, it is surprising that the first case we have found that specifically decided in favor of a jury trial in a Federal diversity suit on a maritime claim (in that case personal injury caused by unseaworthiness) is *Philadelphia & Reading R. Co.* v. *Berg*, 274 F. 534, 539 (3 Cir. 1921), affirming 266 F. 591 (E. D. Pa. 1920),[3] cert. denied, 257 U. S. 638 (1921). The Court of Appeals noted that "The Supreme Court of the United States has not passed upon this specific question, but the right to try on the law site [sic] of the District Court a cause arising in admiralty has been recognized in the Circuit Court of Appeals for the Second Circuit," citing *John A. Roebling's Sons Co.* v. *Erickson*, 261 F. 986 (2 Cir. 1919), cert. denied, 252 U. S. 585 (1920); *Hanrahan* v. *Pacific Transport Co.*, 262 F. 951 (2 Cir. 1919), cert. denied, 252 U. S. 579 (1920), and *Storgard* v. *France & Canada S.S. Corp.*, 263 F. 545 (2 Cir.), cert. denied, 252 U. S. 585 (1920). Examination of the papers on appeal in those suits, all for accidents antedating the Jones Act, shows that diversity did exist and martime claims (unseaworthiness in all three cases and also maintenance and cure in the first) were submitted to the jury; however, such submission was not disputed,

[3] The accident quite clearly antedated the Jones Act, which became effective June 5, 1920, 41 Stat. 1007.

and the point is not discussed.[3] Since the *Berg* case a considerable number of opinions have recognized, either by dictum or by decision, the right to jury trial of a claim for maintenance and cure and other maritime claims of seamen filed on the "law side" of the Federal court on the ground of diversity; *Thornes v. Socony Vacuum Oil Co.*, 38 F. Supp. 616 (S. D. N. Y. 1940); *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890 (D. Mass. 1947) [dictum]; *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950) [dictum]; *Watlack* v. *North Atlantic & Gulf SS. Co., Inc.*, 107 F. Supp. 162 (E. D. Pa. 1952), aff'd, 202 F. 2d 280 (3 Cir. 1953); *Williams* v. *Tide Water Associated Oil Co.*, 227 F. 2d 791 (9 Cir. 1955), cert. denied, 350 U. S. 960 (1956); *Troupe* v. *Chicago, D. and G. Bay Transit Co.*, 234 F. 2d 253, 258 (2 Cir. 1956); *Morrow* v. *Point Towing Co.*, 187 F. Supp. 168 (W. D. Pa. 1960).[4] See also *McAfoos* v. *Canadian Pacific Steamships, Ltd.*, 243 F. 2d 270, 274 (2 Cir.), cert. denied, 355 U. S. 823 (1957); *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 451 (2 Cir.) (concurring opinion), cert. denied, 359 U. S. 1000 (1959).[5]

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[3] The Third Circuit's citation of the Second Circuit cases was likely due to the fact that plaintiff's counsel in all four cases was the late Silas B. Axtell.

[4] Some of the cases suggest that to entitle a diversity plaintiff to a jury trial of a maritime claim joined with a claim at law, the maritime claim alone must satisfy the jurisdictional amount, see *Morrow* v. *Point Towing Co.*, 187 F. Supp. at 169. Normally aggregation for this purpose of claims properly joined is allowed, see 3 Moore, Federal Practice (2d ed. 1948), p. 1815 and cases cited note 5, also 1961 supplement pp. 160-161 and cases cited note 5.

[5] It may also be said with much force that statements by the Supreme Court that where diversity exists, a plaintiff may have an action "at law" in the Federal courts to enforce a maritime claim, see *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 188; *Steamboat Company* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873); *Norton* v. *Switzer*, 93 U. S. at 356; and *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 362 (1959), implicitly included that characteristic feature of an action at law, namely, a jury trial, even though no specific reference to that was made. See also *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959).

In any event, despite a dubious "archeological" argument, see *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354, 370 (1959), that might have been made from other language in the Act of 1789, an argument which, as a matter of possible interest to historians, we state and refute in the margin,[*] the point has now been placed beyond

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[*] Section 9 of the First Judiciary Act, which gave the district courts, *inter alia*, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," subject to the saving clause, provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Since the admiralty and maritime jurisdiction of the district courts under § 9 extended only to "traditional" admiralty causes, such as proceedings *in rem* and suits *in personam* where the complaining party chose to call himself a libelant rather than a plaintiff, *Leon* v. *Galceran*, 78 U. S. (11 Wall.) at 188; Mr. Justice Brennan dissenting in *Romero* v. *International Terminal Operating Co.*, 358 U. S. at 396, the last quoted provision in § 9 would not itself weigh against the view that jury trial could be had in a suit on the "law side" where diversity existed. However, § 12 of the Act of 1789 provided that in the circuit courts, in which diversity jurisdiction had been lodged, "the trial of issues in fact * * * shall, on all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury," and § 19 made it "the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a statement of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court." Since the only suits of admiralty and maritime jurisdiction that could be brought on for initial trial in the circuit courts seem to have been those under the saving clause, notably cases of diverse citizenship, either originally, § 11, or on removal, § 12, it could be argued that the language of § 12 excluding jury trial of issues of fact in admiralty and maritime matters, and of § 19 requiring the court to find the facts in such cases, would have had no purpose unless it covered suits under the saving clause where the source of the right lay in general maritime law.

The answer, perhaps not a wholly satisfactory one, is that the language of §§ 12 and 19 of the Act of 1789 as to admiralty and maritime matters related rather to appeals to the circuit courts "from

all doubt by language in a recent Supreme Court decision, *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, — U. S. — (1962).

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final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars," authorized by § 21, wherein, in accordance with traditional admiralty practice evidence could be taken, see, e.g., *Yeaton* v. *United States*, 9 U. S. (5 Cranch) 281 (1809); *The Lucille*, 86 U. S. (19 Wall.) 73 (1874); *The Charles Morgan*, 115 U. S. 69 (1885); *Irvine* v. *The Hesper*, 122 U. S. 256 (1887). This view gains some support from § 1 of the Act of February 16, 1875, 18 Stat. 315, which provided "That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgment or decrees, and shall state the facts and conclusions of law separately"—substantially as stated in § 19 of the Act of 1789– and then went on "And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue * * * impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law." See *The Abbotsford*, 98 U. S. 440 (1879). Benedict, American Admiralty (3d ed. 1900), p. 104, says that this statute was intended to deal with appeals to the circuit court but that the author had never heard of a case where a jury had been used. See also notes to 28 U. S. C. § 771 (1940 ed.) and *Munson SS. Line* v. *Miramar SS. Co.*, 167 F. 960 (2 Cir.), cert. denied, 214 U. S. 526 (1909).

In addition to this explanation, it seems most unlikely that, with the enthusiasm of the founders for jury trial and their adoption of Coke's "enmity" of admiralty jurisdiction (see Buller, J., in *Smart* v. *Wolff*, 3 T. R. 323, 348, 100 Eng. Regp. 600, 613 (1789); 1 Holdsworth, History of English Law (3 ed. 1922), pp. 556-557; the resolution of the Massachusetts legislature quoted in 1 Holdsworth at p. 558 fn. 2; and the concurring opinion of Mr. Justice Johnson in *Ramsay* v. *Allegre*, 25 U. S. (12 Wheat.) 611, 614 (1827), the framers of the First Judiciary Act could have meant to permit an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to prevent, by removal to the circuit court, a jury trial

However, recognition of this rule does not call for reversal here. When the issue of jury trial arose, the judge had nothing before him save the pleadings. The complaint, on which the jury demand was endorsed, gave no indication of reliance on diversity; the pleader was so little concerned with that subject that he made no allegation of plaintiff's citizenship and alleged that defendant both was and wasn't a citizen of New York, although with an office there. No one called the judge's attention to the answer's disclaimer of defendant's New York citizenship—along with an admission of a New York office, which under the law applicable to suits brought after July 25, 1958, might well have negated diversity if plaintiff were a New York Citizen, 28 U. S. C. § 1332(c). Neither the judge nor, so far as we can see, anyone else then had any idea that Federal jurisdiction was being invoked on any basis other than the Jones Act, or that jury trial of the claim for maintenance and cure was being claimed on any basis other than "pendency" to it —"pendency" was the point of the authorities cited. Counsel's single reference to a "common-law basis" was quite insufficient to apprise the judge of a theory of diversity nowhere disclosed.

Later, in the course of testifying on the merits, San Martin said he had been born in Spain in 1897, had come to the United States in 1915, had joined the American Reporter in New York in 1953, and had lived in New York since

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the plaintiff could otherwise have had or to deprive the in-state defendant sued by the out-state plaintiff in the circuit court of such a trial.

The provisions of the First Judiciary Act here discussed remained in the statute book, save as modified by 5 Stat. 726 (1845), now 28 U. S. C. § 1873, with respect to shipping upon the Great Lakes, until 1948, see Rev. Stat. §§ 566 and 648; Act of March 3, 1875, § 3, Stat. 471; Judicial Code of 1911, § 291, 36 Stat. 1167; 28 U. S. C. § 770 (1940 ed.). The repeal was on the explicit ground that the subject was "covered by rule 38 of the Federal Rules of Civil Procedure," see Reviser's Note to 28 U. S. C. § 1873.

his discharge from the Public Health Hospital in 1955. This, appellant says, shows that San Martin was a citizen either of Spain or of New York, so that diversity in fact existed. This was enough so that if the judge had altered his prior ruling and sent the maintenance and cure claim to the jury, we would affirm, since submission to the jury would have been proper on the facts as they later appeared, and we would conform the pleading to the proof, *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 234 F. 2d 253, 257-258 (2 Cir. 1956); see *Brooks* v. *Yawkey*, 200 F. 2d 663, 664 (1 Cir. 1953). However, counsel did not suggest to the judge that San Martin's statements, made in the course of testifying generally, called for reconsideration of his earlier rulings as to jury trial. We cannot properly direct a busy District Court to retry San Martin's claim for maintenance and cure before a jury, after a fair trial before a judge, on a ground for jury trial not disclosed in the complaint and never brought to the judge's attention after it appeared.

IV.

We thus come to appellant's alternative contention that, even if diversity was not sufficiently made out to render the denial of a jury trial of the claim for maintenance and cure erroneous on that score, San Martin was entitled to such a trial of that claim on the basis of "pendent jurisdiction." In contrast to the argument based on diversity, this contention was raised below with sufficient clarity to require us to consider a question the Supreme Court left open in *Romero*, 358 U. S. at 381, namely, whether in a non-diversity case where a substantial claim has been asserted under the Jones Act, the District Court may and, if so, ought submit to the jury for final determination a claim for maintenance and cure which has been joined with it. On this we are divided. Chief Judge Lumbard, Judges Moore and Kaufman and I, for whom the balance of this opinion speaks, answer the first half of the question in the nega-

tive and do not reach the second; Judges Waterman and Smith, concurring for affirmance, differ with us in holding that in such a case the judge has discretion so to submit to the jury a claim for maintenance and cure arising out of the same event as the Jones Act claim; Judges Clark, Hays and Marshall believe jury trial of the joined claim for maintenance and cure was here required.

(1) By explicit statutory direction an action under the Jones Act is "an action for damages at law with the right of trial by jury," 46 U. S. C. § 688. As "an action * * * at law," it is governed by the Federal Rules of Civil Procedure, F. R. Civ. Proc. 1, despite the inapplicability of those rules "to proceedings in admiralty," F. R. Civ. Proc. 81(a)(1). A claim for maintenance and cure may properely be joined in such an action under the broad language of F. R. Civ. Proc. 18(a). We say this even though the claim is founded on the maritime law and the rule refers to the joinder of "claims either legal or equitable or both," words which we read as inserted, *ex majore cautela*, to prevent future judicial adherence to traditional distinctions against the joinder of legal and equitable claims, not to prohibit the joinder of claims under maritime law which the courts already permitted.[7]

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[7] See *Stevens* v. *R. O'Brien & Co.*, 62 F. 2d 632, 633 (1 Cir. 1933). Such joinder continued to be upheld in the First Circuit after adoption of the Federal Rules, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515, 517 (1940); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (1946), both antedating the First Circuit's position, *Jansson* v. *Swedish American Line*, 185 F. 2d 212, 217-218 (1950) and *Doucette* v. *Vincent*, 194 F. 2d 834, 836 (1952), with respect to the effect of 28 U. S. C. § 1331 overruled in the *Romero* case. Footnote 5 to Chief Judge Magruder's opinion in the *Doucette* case states that diversity was not alleged in any of these three cases and that in *Nolan* the claim for maintenance and cure was for less than $3,000. 194 F. 2d at 840 fn. 5.

Joinder has also been upheld in the Third Circuit, *Lindquist* v. *Dilkes*, 187 F. 2d 21, 25 (1942), and in the Seventh, *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 172 F. 2d 601, 604 (1948). In this Circuit claims for maintenance and cure have long been joined with Jones Act claims, apparently as here without objection, even where there was no diversity.

The mode of trial in actions governed by the Rules is dealt with, clearly and comprehensively, in F. R. Civ. Proc. 38 and 39. These rules set up a basic division between issues as to which the right of jury trial is "declared by the Seventh Amendment * * * or * * * given by a statute of the United States," and others. As to the former the right "shall be preserved to the parties inviolate," F. R. Civ. Proc. 38(a), subject only to timely demand, F. R. Civ. Proc. 38(b); even when timely demand has not been made, the court may in its discretion "upon motion" order a jury trial of such issues, F. R. Civ. Proc. 39(b). However, under the plain language of the Rules, that is the limit of the court's freedom. If the issue is not one triable to a jury as of right, the court is limited to an advisory jury, unless both parties consent to "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." F. R. Civ. Proc. 39(c). This meshes with the direction in Rule 52(a) that in non-jury matters "the court shall find the facts specially and state separately its conclusions of law thereon," a meshing made all the plainer by the 1946 amendment explicitly making Rule 52(a) applicable when there has been an advisory jury. When a complaint joins claims differing in character, each is to be given the mode of trial appropriate to its nature, *Dairy Queen, Inc.* v. *Wood*,——U. S.——(1962); *Ring* v. *Spina*, 166 F. 2d 546, 550 (2 Cir.), cert. denied, 335 U. S. 813 (1948); *Orenstein* v. *United States*, 191 F. 2d 184 (1 Cir. 1951); *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir. 1952); *Schaefer* v. *Gunzburg*, 246 F. 2d 11 (9 Cir.), cert. denied, 355 U. S. 831 (1957); *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F. 2d 77 (1 Cir. 1957), although a prior jury verdict on a "legal" issue may conclusively determine an "equitable" one, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959).

The sharp distinction made between the court's discretion to order an ordinary jury trial on an issue where this might have been but was not demanded, Rule 39(b), and the limitations imposed upon the court, Rule 39(c), with respect to issues "not triable of right," forbids a construction permitting a judge to order "a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right" on an issue where no right to such a trial exists, merely because he might deem this convenient. Nothing to the contrary is indicated by decisions that an appellate court will not always reverse because of erroneous grant of a jury trial, *Hurwitz* v. *Hurwitz*, 136 F. 2d 796, 799 (D. C. Cir. 1943); cf. *Cargill, Incorporated* v. *Commodity Credit Corporation*, 275 F. 2d 745 (2 Cir. 1960), as it would be obliged to do for erroneous denial of one; the question is how to obey the Rules, not the consequence of disobeying them. We must confess that we can now see no sufficient reason why the Rules should be so rigidly drawn;[8] we should think it desirable for a judge to have discretion to send to "a jury whose verdict has the same effect as if trial by jury had been a matter of right" all or part of equitable or maritime claims closely related to other claims on which jury trial is being had as of right, without as well as with "the consent of both parties,"[9] and would hope that those

[8] Perhaps the Committee justifiably thought it had done pretty well in accomplishing the merger of law and equity and did not wish to risk further ire from the proponents of equity by what might then have seemed a rather drastic proposal to give the judge discretion to order ordinary jury trial of an equitable claim.

[9] For example, a judge confronted with a maintenance and cure claim in a case such as this might like to have the jury determine finally, rather than on a merely advisory basis, whether plaintiff's ailment arose while in the service of the ship, since the jury would have to consider this on the personal injury claim, but reserve for himself the purely medical issue when maximum cure was effected if the verdict entitled the plaintiff to some award.

now engaged in revising the Rules would consider such a change. However, the language of the Rules is too clear for any such reading, and we are therefore obliged to reject the unexplained *per curiam* dictum of a divided court in *banc*, *Reardon* v. *California Tanker Company*, 260 F. 2d 369, 376 (2 Cir. 1958), cert. denied, 359 U. S. 926 (1959), that the mode of trial of a claim for maintenance, cure and wages joined with a claim for personal injury under the Jones Act rests in the discretion of the trial court, and address ourselves to the issue whether San Martin was given the right to jury trial of that claim "by the Seventh Amendment to the Constitution or * * * a statute of the United States," F. R. Civ. Proc. 38 (a).

(2) Appellant does not contend that jury trial of a claim for maintenance and cure is "declared by the Seventh Amendment." The guarantee of jury trial in that amendment is limited to "suits at common law," the "common law" being, in Mr. Justice Story's words, "the common law of England, the grand reservoir of all our jurisprudence." *United States* v. *Wonson*, 28 Fed. Cas. 745, 750 (C. C. D. Mass. 1812). The amendment is "limited to rights and remedies peculiarly legal in their nature," *Shields* v. *Thomas*, 59 U. S. (18 How.) 253, 262 (1856); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48 (1937). "By common law, they [the framers] meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and maritime law and equity was often found in the same suit." *Parsons* v. *Bedford*, 28 U. S. (3 Peters) 433, 446-447 (1830). Since longshoremen's claims "are governed by the maritime law as established

by the Congress and are within the admiralty jurisdiction, the objection * * * as to the right of trial by jury under the Seventh Amendment is unavailing," *Crowell* v. *Benson*, 285 U. S. 22, 45 (1932); the same must be true as to seamen's. "Even in saving clause cases * * * where the plaintiff seeks a remedy which the common law is competent to give, there is not a *constitutional* right to jury trial; Congress could repeal the saving clause and make the federal admiralty remedy exclusive, with the clear result that there would be no right to jury trial in maritime cases." Currie, *supra*, at 5.

(3) In the light of the *Romero* decision, ruling out 28 U. S. C. § 1331 as a statute of the United States which might afford a right of jury trial on a claim for maintenance and cure, the only statutes of the United States requiring consideration are the Jones Act and the saving clause.

(a) The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *." We held in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2 Cir.), cert. denied 359 U. S. 1000 (1959), that when a seaman suing for personal injury under the Jones Act predicated his action both on unseaworthiness and on negligence, both claims must be submitted to the jury. Judge Medina, writing for Judge Clark and himself, based this decision, 263 F. 2d 446, on "the fundamental singleness of the underlying claim, the fact that the Jones Act claim and the maritime claim, of unseaworthiness," both claims in tort, generally predicated on the same facts and carrying the same measure of damages, "are so intertwined factually that they

cannot as a matter of practice be separated into pieces." In that sense and in that only the unseaworthiness claim was described as "pendent," 263 F. 2d at 447. Judge Lumbard, concurring, proposed a further ground, 263 F. 2d at 449-453, namely, "that the Jones Act, in permitting an action 'at law' for 'damages' for 'personal injury' to seamen, permitted them such an action based on the maritime doctrine of unseaworthiness as well as the legislative maritime doctrine of negligent operation." In a sense the result in the *Bartholomew* case followed rather inevitably from the Supreme Court's decision in *Baltimore SS. Co.* v. *Philips*, 274 U. S. 316 (1927), that a judgment on a claim for personal injury based on unseaworthiness will bar assertion of a claim for the same injury based on negligence, and from *Pate* v. *Standard Dredging Co.*, 193 F. 2d 498, 502 (5 Cir. 1952), relied on by Judge Medina, 263 F. 2d 446 fn. 12, holding that a claim of unseaworthiness was not a "separate and independent claim or cause of action" so as to permit removal of a Jones Act claim under 28 U. S. C. § 1441(c). Since the claim for maintenance and cure in the *Bartholomew* case had been tried to a judge in accordance with what had become the established practice in this circuit, nothing in the opinion was addressed to the mode of trial of such a claim.

It has long been recognized that the relationship of a claim for maintenance and cure to one for personal injury under the Jones Act is wholly different from the allegation of unseaworthiness in addition to negligence as a basis for the personal injury claim. The distinction was sharply drawn in *Pacific SS. Co.* v. *Peterson*, 278 U. S. 130 (1928), by the same bench that had decided the *Phillips* case eighteen months before. Receipt of maintenance and cure, the Court held, did not bar a subsequent action for personal injury under the Jones Act as a judgment in respect of unseaworthiness would. Mr. Justice Sanford disavowed, 278 U. S. 136, a previous expression of his in *Engel* v.

Davenport, 217 U. S. 33, 36 (1926), which might be taken "to mean that the right to recover compensatory damages under the new rule was granted as an alternative to the allowances covered by the old rules, including maintenance, cure and wages *** *" The right given by the Jones Act "is not an alternative of the right under the old rule to 'maintenance, cure and wages'—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in The Montezuma (C. C. A.), 19 F. 2d 355, 356, the 'personal indenture created by the relation of the seaman to his vessel,'" a right "implied in law as a contractual obligation arising out of the nature of the employment" and "independent of the right to indemnity or compensatory damage for an injury caused by negligence," 278 U. S. 137-138.

It is not unnatural that, with this guidance, most Courts of Appeals took a radically different approach to the status of a claim for maintenance, cure and wages vis-a-vis a claim for personal injury under the Jones Act with which it had been joined, than with respect to the assertion of unseaworthiness in addition to negligence as a basis for recovery. The *Pate* decision, *supra*, assumed, 193 F. 2d 502, that a claim for maintenance and cure constituted a "separate and independent claim" under 28 U. S. C. §1441(c), which would have warranted removal in a case of diverse citizenship if jurisdictional amount existed. Somewhat earlier, dealing with the very question here presented, Judge Maris had written, for a unanimous court *in banc*, that it was error to send to a jury a claim for maintenance and cure joined with a claim for personal injury under the Jones Act, *Jordine* v. *Walling*, 185 F. 2d 662, 671 (3 Cir. 1950), a decision shortly followed in *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82, 85-86 (7 Cir.), cert. denied, 342 U. S. 888 (1951). The

leading text thus correctly states, "By unquestionable authority a maintenance and cure claim is 'separate and independent' from both a Jones Act claim or an unseaworthiness claim for purposes of *res judicata* or § 1441 (c) or anything else." Gilmore and Black, Admiralty, p. 341. And we ourselves have recently said, in *Ryan* v. *United States Lines Company*, —— F. 2d ——, —— (2 Cir. 1962), that the claims are "totally different."

The differences exist both in the legal nature of the claims and in the practicalities of trial. The personal injury claim sounds in tort; the claim for maintenance, cure and wages "has its source in a relation which is contractual in orgin, but given the relation, no agreement is competent to abrogate the incident," *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932); see *Vaughan* v. *Atkinson*, —— U. S. —— (1962). The amount sought is likewise different; that involved in the claim for maintenance, cure and wages is usually a small fraction of that sued for in the personal injury claim. Even though the incident contended to give rise to the personal injury claim is found never to have occurred, the seaman will still be entitled to maintenance, cure and wages if his condition arose in the service of the ship. The litigated points on the latter claim are simply whether the condition arose in the seaman's service and when maximum cure has been effected; this is usually a contest of medical experts, on issues the former of which may have little and the latter has no relation to the personal injury claim.

However, the practice in this Circuit until 1956 seems to have been to submit a claim for maintenance and cure to the jury along with a claim under the Jones Act, even though no diversity existed. The legal basis for this, and the contrary authorities in other circuits were not discussed, although the practice was noted, without disapproval, in *McAllister* v. *Cosmopolitan Shipping Co.*, 169 F.

2d 4 (1948), rev'd on other grounds, 337 U. S. 783 (1949); *Gonzales* v. *United Fruit Co.*, 193 F. 2d 479 (1951); and *Rosenquist* v. *Isthmian SS. Co.*, 205 F. 2d 486 (1953). *Weiss* v. *Central R. Co.*, 235 F. 2d 309 (1956), was the turning point. This Court's opinion, by Judge Clark, mentioned in a footnote that the judge had decided the maintenance and cure count, at the plaintiff's request and, apparently, without objection by the defendant—"Hence there is not involved the practice followed in this circuit of submitting the issue of maintenance and cure to the jury, along with the issue of negligence," citing the *Gonzales* case, *supra*. The footnote added "Obviously the simultaneous trial of the two claims—one to the judge sitting in admiralty and the other to the jury—is convenient and proper." This considered statement and its approving citation of *Jordine* v. *Walling* and *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, *supra*, caused the district courts in this circuit generally to alter their practice so that, although unseaworthiness claims joined in Jones Act suits have regularly been submitted to the jury even though there be no diversity, claims for maintenance and cure in non-diversity cases have been reserved for trial by the judge. See, e.g., *Troupe* v. *Chicago, D & G. B. Transit Co.*, 234 F. 2d 253, 256 (1956); *Bartholomew* v. *Universe Tankships, Inc.*, *supra*, cert. denied, 359 U. S. 1000 (1959); *Murray* v. *New York Central R. Co.*, 287 F. 2d 152, 153, cert. denied, 366 U. S. 945 (1961); *Salem* v. *United States Lines Co.*, 293 F. 2d 121, 124, rev'd on other grounds, —— U. S. —— (1962). Since the district judges were following the lead we had given them in *Weiss*, we naturally approved; and the later dictum as to discretion, in *Reardon*, appears to have had little or no practical effect.

(b) It is now urged that even though the claim for maintenance, cure and wages be not "pendent" to the personal injury claim in the limited sense defined in *Bartholomew*,

it is "pendent" in a more general sense which entitled the plaintiff to a jury trial under the "saving clause."[10] The Supreme Court pointed out in *Romero*, 358 U. S. 380-381, the anomaly of applying the "pendent jurisdiction" doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933)—that the assertion of a Federal claim permits a Federal court to decide a sufficiently related non-Federal claim otherwise outside its jurisdiction—to a claim for maintenance and cure which is always within Federal jurisdiction under 28 U. S. C. § 1333(1), as, indeed, both Judge Medina and Judge Lumbard had done a few weeks earlier in *Bartholomew*, 263 F. 2d at 449, 455. Moreover, *Hurn* v. *Oursler* relates to the jurisdiction of a Federal court to decide a claim—not to the mode of trial; no one has ever supposed that joinder of a "state" equitable claim with a related "federal" legal claim under *Hurn* v. *Oursler* entitled the former to a jury trial. We see no reason for a different result when the joined claim is a Federal claim arising under the general maritime law.

We likewise see no force in an argument that if the door to the "law side" of the Federal court is unlocked by a claim under 28 U. S. C. § 1331, here the Jones Act, the "saving clause" takes over and gives a right to jury trial on any claim for a money judgment properly joined, despite its maritime nature, just as if the door had been unlocked by diversity, § 1332. This overlooks what the saving clause was to save. The framers of the First Judiciary Act were concerned with the many maritime claims for money judgments, which during the Revolution and under the Articles of Confederation had generally been tried in courts of the

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[10] The change in language in the saving clause by the Judicial Code revision of 1948 is without significance—the Reviser's Note stating that the "substituted language" had been used as "simpler and more expressive of the original intent of Congress * * *" See Gilmore and Black, Admiralty (1956), 35.

colonies or the states,[11] conveniently located to the suitors, and with jury trial. The prime purpose of the saving clause was to insure that such suits could continue to be brought and tried where and as they had been, *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390 (1848); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 362. However, the grant of diversity jurisdiction allowed an out-state defendant sued by an in-state plaintiff on a maritime claim in a state court to remove such a suit to the circuit court, and a plaintiff of diverse citizenship to bring it there. In order to prevent this from altering the mode of trial, as well as to preserve for the diversity plaintiff suing in the circuit court the same mode of trial he would have had in the state court, there was developed the rule, noted in section III of this opinion, that when a maritime claim for a money judgment is heard in a Federal court because of diversity, the saving clause entitles the parties to the same jury trial they would normally have had in the state court. It was stated from an early date that the common law remedy preserved by the saving clause existed in the Federal courts only in diversity cases. *The Belfast*, 74 U. S. (7 Wall.) 624, 643 (1869); *Leon* v. *Galceran*, 78 U. S. (11 Wall.) 185, 188 (1871); *Steamboat Co.* v. *Chase*, 83 U. S. (16 Wall.) 522, 533 (1873), to which, broadly speaking, the circuit courts were limited until 1875, 18 Stat. 470.

The saving clause considerations thus calling for a jury trial of a maritime claim in a diversity case are in no way pertinent to a non-diversity maritime claim joinable but not unitary with a statutory claim to which Congress has accorded jury trial. Existence of a related Federal statutory claim does not expose the plaintiff suing in a state court under the saving clause to a risk of removal, as

[11] Although some colonies and states created admiralty courts after 1776, the jurisdiction of most of these was limited to prize cases. See Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 Corn. L. Q. 460 (1925).

diversity does; he may protect himself, by limiting his state court action to his non-statutory claim.[12] Moreover, in the Jones Act, Congress specifically provided that the new statutory claim should not itself be removable, 28 U. S. C. § 1445(a); hence even the joinder of such a claim with one for maintenance and cure does not give the defendant any right to remove the latter that he would not otherwise have had. Neither does the new statutory claim afford a non-diversity plaintiff a new opportunity to deprive the defendant of jury trial of the non-statutory claim by suing in the Federal court under § 1331—the plaintiff could always have had non-jury trial of the maritime claim by suing in admiralty under § 1333. Finally, whereas jury trial is needed to give the diversity plaintiff the same right in the Federal that he would have had in the state court, there is no similar basis for Federal solicitude with respect to the non-diverse plaintiff. Hence there is no reason why a claim for maintenance and cure should stand any differently with respect to jury trial in a Federal court after the Jones Act than before, unless the very existence of the new statutory claim demands this. A unanimous Supreme Court in 1928, far closer to the Jones Act than we, unmistakably considered that the Act had left maintenance and cure exactly as this had always been, *Pacific SS. Co.* v. *Peterson, supra;* we would see no reason for a different view even if we had the power to take one. We conclude that since neither the Jones Act nor the saving clause gave plaintiff a right to jury trial of his claim for maintenance and cure, it would have been error, under Rules 38 and 39, to grant him one, save on an advisory basis.

The judgment is affirmed.

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[12] Although 28 U. S. C. § 1441 permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," the saving clause forbids a literal reading that would include actions of which a district court would have jurisdiction solely because of 28 U. S. C. § 1333. *Hill* v. *United Fruit Co.*, 149 F. Supp. 470 (S. D. Cal. 1957).

CLARK, *Circuit Judge*, whom Judges HAYS and MARSHALL join, dissenting:

Commentators have had occasion to refer to the Jones Act, 46 U. S. C. § 688, passed in 1920, as an example of "impossibly bad drafting." Gilmore & Black, The Law of Admiralty 282 (1957). But since 1940 "the Supreme Court has been rewriting the law" and the "rewrite job has gone far enough to make it clear that a revolution has taken place." *Ibid.* 248. In this process, recovery for personal injuries for unseaworthiness has practically swallowed Jones Act negligence, which remains only as a convenient tag upon which to ground jurisdiction "at law" and trial by jury as granted in the statute. It is now clear that claims based on unseaworthiness and on maintenance and cure may be joined with claims for negligence, and that there is a right of trial by jury on the unseaworthiness claim so joined. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 263 F. 2d 437, certiorari denied 359 U. S. 1000; and see *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 380-381. Left undecided is the question here at issue, namely whether there is a right to jury trial on the claim for maintenance and cure when joined with a claim for Jones Act negligence.

That this is a serious and troublesome issue is shown by the three different opinions held by us on this appeal. Differences are perhaps natural in view of the clash of policy between safeguarding a cherished admiralty right, long antedating the Jones Act, on the one hand, and the clarity and convenience of the unitary approach now being achieved under that Act on the other. The rationale of that approach seems such as to include all three of the claims we are considering in situations such as here disclosed, and we have concluded that they should be treated alike so far as the form of trial is concerned.

Before analyzing this more carefully we should note that a claim for maintenance and cure may be asserted on quite other facts than those of the accident giving rise to the claims for damages for personal injuries, and the claim may therefore be one remediable only in admiralty. What we are dealing with are overlapping claims arising out of a single accident—the situation here, as expressly alleged in the complaint. Many of the cases cited by my brother FRIENDLY to show the separate nature of the maintenance-and-cure claim are those where there were not overlapping claims or where the defendant did not show that an award so made involved double recovery, while others were those where the parties failed to object to a court trial. It seems that only lately has this problem of duplicating recoveries assumed the importance it deserves. But once perceived, there is no question about the answer and the need to avoid such duplication of recovery. Thus in the second *Bartholomew* case we remanded specifically for the deduction of such overlapping recoveries, holding the burden on the defendant to show the amount thereof. *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 279 F. 2d 911, 916-917, citing cases such as *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Smith* v. *Lykes Bros.-Ripley S.S. Co.*, 5 Cir., 105 F. 2d 604, certiorari denied *Lykes Bros. Ripley S.S. Co.* v. *Smith*, 308 U. S. 604; and *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, certiorari denied 359 U. S. 926. See also Gilmore & Black, The Law of Admiralty 261 (1957). The inconvenience and often error of this duplicating form of trial points to the need for a rule of law preserving the unitary approach to include a claim for maintenance and cure, as well as of negligence and unseaworthiness, all arising out of the same accident. Further, the doctrine of collateral estoppel will bar relitigation of issues and facts settled in earlier litigation and may thus operate in particular

instances even to cut down the jury trial now so thoroughly supported under the *Bartholomew* principle. See *McCarthy* v. *American Eastern Corp., supra,* 3 Cir., 175 F. 2d 727, certiorari denied 338 U. S. 911; *Runyan* v. *Great Lakes Dredge & Dock Co.,* 6 Cir., 141 F. 2d 396; *La Fontaine* v. *The G. M. McAllister,* D. C. S. D. N. Y., 101 F. Supp. 826.

In the light of these well settled principles it would seem that careful analysis supports the teaching of practical convenience and necessity to the effect that the single claim or cause should be considered at the one trial. As Judge FRIENDLY shows, a presently popular rationale treats the additional admiralty claims as "pendent" to the Jones Act claim "at law" for negligence. See *Bartholomew* v. *Universe Tankships, Inc., supra,* 2 Cir., 263 F. 2d 437, 448, certiorari denied 359 U. S. 1000; *Romero* v. *International Terminal Operating Co., supra,* 358 U. S. 354, 380-381; *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 331. Another approach is that of Judge LUMBARD in the first *Bartholomew* case, 2 Cir., 263 F. 2d 437, 448, that the Jones Act itself should be construed as broad enough to include all these claims in its aegis. These are but differing ways of stating the same result, which goes back to "the fundamental singleness of the underlying claim" where "the legal theories differ somewhat," but "from the standpoint of the parties the facts all exist as a single unit." Medina, *J.*, in 2 Cir., 263 F. 2d 437, 446, 447. To the writer clarity and convenience in thinking are promoted by viewing the situation in terms of the single cause of action, the identic factual situation which may give rise to several rights of action or legal remedies. "On any realistic appraisal there should be only one cause of action for jurisdiction and hence for trial. When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with a right of jury trial on

all the issues." 5 Moore's Federal Practice 284 (2d Ed. 1951).

This points the way to a logical as well as convenient solution. When the claim for maintenance and cure is based on a cause of action unconnected with that upon which the claims of negligence and unseaworthiness are founded, then the claim must be pursued in admiralty and there is no right to a jury trial. When, however, all the claims are based on the same cause of action, then they must be tried as a unit and the right of jury trial accorded by the Jones Act applies to all the contentions. That is the situation here under the issues tendered by the complaint; and since the plaintiff pressed his claim for jury trial, the court was in error in reserving trial to itself.[1]

The approach we have made accords with the authorities we have cited and is not precluded by any specific precedent, so far as we are advised. True, there is much by way of dicta or lack of discussion or even overlooking of the point, all of which adds to the confusion. Actual decision is scanty to the point of nonexistence. This fact, plus undoubted dicta (in which the writer also has participated), does lend support to the approach of our brothers WATERMAN and SMITH, suggesting that we might still continue to rely upon our past statements, holding maintenance and cure a remedy always available also in admiralty, until the Supreme Court tells us otherwise. But notwithstanding our sympathy for this view, we are constrained to conclude that we must go where reason and practical necessity take us,

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[1] Seemingly the scholarly commentators support the unitary approach and trial by jury as the preferred course. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 4-6, 41-51, 58-65, esp. 63-64 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 849, 850 (1960); 73 Harv. L. Rev. 138, 142-146 (1959); 5 Moore's Federal Practice 284 (2d Ed. 1951); Gilmore & Black, The Law of Admiralty 262 (1957).

namely to the unitary form of approach and the resulting trial by jury as we have outlined.

There remains the third approach to this issue, that set forth by judge FRIENDLY speaking for himself and three other members of the court. We are constrained to hold this the least satisfactory of the three on policy, precedent, and logical analysis. First it is held that, while normally a jury trial may be had of maintenance and cure when jurisdiction is based on diversity of citizenship, such claim was here lost or waived by inadequate pleading or disclosure to the court. This, we suggest, is cavalier treatment of perhaps the most cherished of all procedural rights and is not justified on the record before us.[2] No precedent is cited for this novel restriction on the jury trial right. Then

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[2] This is based in substance upon the failure of the complaint to set forth the plaintiff's citizenship, jurisdiction being there based on the Jones Act. But under modern civil procedure, the jury trial right comes from the Constitution, not the trial court, and such trial being once claimed (as here in the plaintiff's complaint) cannot be lost unless it is waived by written stipulation or oral stipulation made in open court. F. R. 38(b)(d); 39(a); James, *Trial by Jury and the New Federal Rules of Procedure*, 45 Yale L. J. 1022 (1936); Clark, Code Pleading 113-122 (2d Ed. 1947). There is no requirement that a party must plead in such a way as to warn the court of his constitutional right. Actually here the plaintiff's counsel in pressing his claim in successive colloquies at the opening of trial cut short by the judge's adverse rulings made broad contentions quite adequate to cover this issue. Thus he specifically cited jury trials of state actions at law for maintenance and cure. Indeed it is difficult to see how he could have put his claim more inclusively unless he could have foreseen the novel trend my brothers' opinion was later to take. Rather inconsistently they hold that the claim for jury trial of the issue as *pendent* to the main issue was sufficiently asserted to require disposition even though "pendent" was never mentioned in the colloquies. Further the court is bound to examine the entire record to see if San Martin's citizenship was there disclosed, *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 257-258, and amendment of the pleadings, even on appeal, is directed by 28 U. S. C. § 1653. See *Brooks* v. *Yawkey*, 1 Cir., 200 F. 2d 663, 664.

it is held that all claims for maintenance and cure not brought in the court's diversity jurisdiction must invariably be tried to the court. This presents the unusual spectacle of a forced court trial and of course rejects the unitary approach by arbitrary fiat and not for policy or convenience in the large number of cases to which it is applicable.[3] The result is necessarily a rigid compartmentalized system where jury trial must be had in some of the cases, and court trial in others. Since this division is unconnected with the practicalities of the situation, since in this type of case it is easy to overlook the citizenship of the parties where the Jones Act is the primary source of federal jurisdiction, we must necessarily expect reversals

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[3] This appears to be a complete acceptance in this area of the law, and a rejection of our settled rule to the contrary, of the holding in *Jordine* v. *Walling*, 3 Cir., 185 F. 2d 662, that jury trial of the issue of maintenance and cure constitutes reversible error. This holding, which has been widely criticized by scholars—see the writers cited in note 1 *supra*, and notably Professors Moore and Currie—has not been followed in the First Circuit, where the practical need of jury trials has been ably set forth by Judge Wyzanski in the oft-cited case of *Jenkins* v. *Roderick*, D. C. Mass., 156 F. Supp. 299, 304-306, following *Doucette* v. *Vincent*, 1 Cir., 194 F. 2d 834, 840, 846. We have cited with approval Professor Moore's criticism, 5 Moore's Federal Practice 281-285 (2d Ed. 1951), *supra*, of the *Jordine* case as improperly dividing up a single cause of action, and have never found error in the submission of this issue to a jury, *Gonzales* v. *United Fruit Co.*, 2 Cir., 193 F. 2d 479, 480 n. 1; see also *Rosenquist* v. *Isthmian S.S. Co.*, 2 Cir., 205 F. 2d 486, and *McAllister* v. *Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4, reversed on another issue 337 U. S. 783. A dictum in a footnote in *Weiss* v. *Central R. Co. of N. J.*, 2 Cir., 235 F. 2d 309, 310, n. 1, has occasionally been misread as expressing a preference for court trial of this issue, even though it cited and relied on the *Gonzales* case, and only ventured to suggest that the trial judge had also discretion to order a court trial. That suggestion we now believe should be withdrawn for the reasons stated in the text of this dissent.

based on form rather than substance.[4] We fear the unsatisfactory results which will ensue from this novel formalism in the general maritime law.

Our conclusion therefore is that the district court erred in depriving the plaintiff of his asserted right to a jury trial of his entire cause of action. The judgment should therefore be reversed and the action remanded for a trial to the jury.

SMITH, *Circuit Judge*, Concurring in the result:

Judge Waterman and I concur in the result reached by Judge Friendly and our three colleagues who have concurred in his opinion. We affirm, with them, the action of the court below. We agree that when a maintenance and cure claim arising out of the same event that gave rise to the Jones Act claim is coupled with the Jones Act claim and therefore tried on the "law side" of the court, and the parties are of diverse citizenship,[1] the maintenance and cure claim must be tried to a jury. We agree that, when the parties are not of diverse citizenship, even though the Jones Act claim is tried to a jury, it is proper to try the maintenance and cure claim to the judge alone.

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[4] The stress placed on the supposed compulsion of F. R. 39(c) seems out of place, for the rules provide only a procedure for working out the substantive rules of trial elsewhere stated, as in the Constitution or statutes. If a trial judge does take a jury verdict when he is not required to do so, error cannot be assigned on his action. *Hurwitz* v. *Hurwitz*, D. C. Cir., 136 F. 2d 796, 799, 148 A. L. R. 226; *Rath* v. *Wilgus*, 110 Neb. 810, 195 N. W. 115; *Groome* v. *Steward*, D. C. Cir., 142 F. 2d 756; Clark, Code Pleading 90, 102, 106, 107 (2d Ed. 1947).

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[1] By the phrase "diverse citizenship" we include all prerequisites for so-called "diversity jurisdiction" on the law side of a federal district court, not simply a pleading that the parties are residents of different states.

We are also of the opinion, however, and in this respect we differ from our colleagues, that in this latter situation the trial judge may deem it advisable to submit the maintenance and cure claim to the jury along with the Jones Act claim, and if this is done we would not consider such a submission erroneous but well within a proper discretion so as to preserve a unitary case.

When in a non-diversity case a maintenance and cure claim is presented for adjudication with a Jones Act claim, but the maintenance and cure claim does not arise out of the same event as the Jones Act claim, we are of the opinion that the maintenance and cure claim should always be tried to the court alone, and never submitted to the jury, even if the Jones Act claim is jury-submitted.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

" CHARLES E. CLARK,
" STERRY R. WATERMAN,
" LEONARD P. MOORE,
" HENRY J. FRIENDLY,
" J. JOSEPH SMITH,
" IRVING R. KAUFMAN,
" PAUL R. HAYS,
" THURGOOD MARSHALL,
Circuit Judges.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, deceased,
Plaintiff-Appellant,

v.

UNITED STATES LINES COMPANY,
Defendant and Third Party Plaintiff-Appellee,

UNITED STATES OF AMERICA,
Third Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the defendant-appellee.

A. DANIEL FUSARO,
Clerk.

by VINCENT A. CARLIN,
Chief Deputy Clerk.